

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 82-8
DONALD BISHOP	)	

FINDINGS OF FACT, OPINION, AND ORDER

Statement of Case

On February 8, 1982, the Vermont State Employees' Association ("VSEA") filed a grievance on behalf of Donald Bishop ("Grievant"), alleging Grievant's periods of temporary relief from duty were in violation of Article 15 of the collective bargaining agreement effective from July 1, 1981-June 30, 1982, between the VSEA and State of Vermont ("Agreement"), and that the dismissal of Grievant from his position as Residential Living Specialist B at Brandon Training School violated Article 5(1) and 15 of the Agreement.

A hearing was held before Board Chairman Kimberly B. Cheney and Member William G. Kemsley, Sr. on June 30, 1982, at the Brandon Training School Administration Building Hearing Room. Member James S. Gilson was absent. Subsequent hearings were held on July 9 and 15, 1982, at the Board Hearing Room in Montpelier. Prior to the July 9 hearing, the parties submitted to the Board a stipulation on various facts and the admission of certain exhibits. The July 9 hearing was conducted in the absence of Member Gilson, and the full Board was present on July 15. At the July 15 hearing, the Board proposed and the parties stipulated Mr. Gilson could participate in resolving the legal issues, but that the facts would be decided by Chairman Cheney and Member Kemsley. Mr. Gilson has participated in resolving the legal issues, but not the facts.

On July 22, 1982, the parties filed the deposition of Dr. Richard Surles, Commissioner of Mental Health. It is agreed between the parties, with the approval of the Board, that the deposition will be considered by the Board in lieu of testimony by Dr. Surles.

VSEA filed their Requested Findings of Fact on August 13, 1982, and a Memorandum of Law on August 17, 1982. The State filed their Requested Findings and Memorandum on August 17, 1982.

#### FINDINGS OF FACT

1. Grievant was employed at the Brandon Training School ("Brandon") from February 3, 1980 to his dismissal January 8, 1982. Brandon is a State-run institution for the mentally retarded.

2. Grievant lived in North Carolina from 1971 to April 5, 1974. While in North Carolina Grievant was convicted of driving under the influence of alcohol on August 17, 1973. For this offense, Grievant was sentenced to 60 days imprisonment. This sentence was suspended, conditioned on his not operating a vehicle for 12 months and not violating any laws of the State of North Carolina for one year. (State's Exhibit 21). On February 21, 1974, Grievant was convicted of carrying a concealed weapon, driving with license revoked, and temporary larceny of an automobile. He was adjudged to have violated the terms of his suspended sentence. The suspended sentence was revoked and Grievant was ordered to serve 60 days imprisonment. For driving while his license was revoked, he was sentenced to 18 months imprisonment to commence at the expiration of the above sentence. For the temporary larceny of an automobile, one year imprisonment was ordered, with Work Release recommended. Finally, the carrying of a concealed weapon resulted in his ordered imprisonment for six months (State's Exhibits 22, 23, 24, 25).

3. Grievant began serving his sentences for those offenses on or about February 21, 1974. His release date under the sentence imposed was scheduled to be March 25, 1975, and he would have been eligible for parole on June 22, 1974. The place of confinement was a misdemeanor camp run by the Department of Corrections, which was located in Hazelwood, North Carolina. Pursuant to the recommendation of the court, Grievant was placed in a work release program during his confinement. His place of work was a furniture factory, also located in Hazelwood, North Carolina. Grievant was allowed to go unescorted to and from his workplace (Grievant's Exhibit 28).

4. April 5, 1974, was a payday for Grievant at his workplace. When he received his paycheck, rather than returning to the misdemeanor camp, Grievant went to a local bank, cashed his check, bought a bus ticket to Rutland, Vermont, boarded a bus bound for Vermont, and thereby escaped from confinement.

North Carolina law makes escape from confinement for misdemeanor offenses a misdemeanor, and punishable by imprisonment of not less than three months nor more than one year (State's Exhibit 26, Grievant's Exhibit 29).

5. Grievant and his wife, a few days prior to January 30, 1980, filled out an application for Vermont State employment at their home. Grievant's wife commonly helped him fill out employment applications because of his difficulty with reading and spelling. They filled out the application because Grievant had been scheduled by the Rutland Job Service Office for an appointment on January 30, 1980, at the Brandon Training School, which was accepting applicants for vacant aide positions. One of the questions on the application was the following:

In the past five years have you been imprisoned, on probation, or fined for any violation of any law or ordinance (except parking violations)? If yes, explain. A record of conviction is not an automatic bar from employment.

(State's Exhibit 27)

To that question, Grievant and his wife answered "No". That answer was literally correct because Grievant's previous conviction and imprisonment had occurred more than five years previously.

6. On January 30, 1980, Grievant went to Brandon Training School to submit his application for employment. Grievant forgot to take the application he and his wife had previously completed. As a result, he filled out another application on the spot. To the question concerning previous convictions (see finding 5), Grievant answered "No". Grievant inadvertently misdated the application, giving the date as January 30, 1979, rather than 1980, because he had not yet made the mental transition to the new year (Grievant's Exhibit 2).

7. At the end of the employment application submitted by Grievant, just before the signature space, the following warning appeared:

I hereby certify that my application form and all attachments to it contain no false information and are complete to the best of my knowledge. I am aware that if an investigation discloses misrepresentation or falsification, my application may be rejected, my name may be removed from the register, and if already employed, I may be dismissed from State Service, and I may be disqualified from applying in the future for any position covered by the Rules and Regulations of the State of Vermont.

(Grievant's Exhibit 2, page 2)

8. At all times relevant herein, the Agreement contained no express provision dealing with sanctions for false information on employment applications. The only sanction for false applications authorized by the Rules and Regulations for Personnel Administration was the disqualification of the applicant for admission to examination or initial appointment to a position (Grievant's Exhibit 24, Grievant's Exhibit 30, section 7.06, 7.065).

9. As a result of his application, Grievant was hired by Brandon as a temporary employee in the position class of Brandon Residential Living Specialist A (pay scale 3). He occupied that temporary position from February 3, 1980, to February 23, 1980, when he resigned from the temporary position in order to accept a permanent classified position as a Brandon Residential Living Specialist A (pay scale 3). Grievant successfully completed his probationary period in that position on August 31, 1980. On October 25, 1981, Grievant's position was reallocated from Brandon Residential Living Specialist A (pay scale 3) to Brandon Residential Living Specialist B (pay scale 5). He occupied that position until his dismissal (Grievant's Exhibit 1; Grievant's Exhibit 5, pages 1, 2, 3, 10 and 12).

10. The mentally-retarded persons who are institutionalized at Brandon ("residents") are of all ages (from 9 to 90), and number about 280. Brandon is a 24 hour-a-day operation, and the number of staff members was, at all times relevant, approximately 600. The residents are housed in "dorms". There are 16 dorms, and the average dorm houses about 20 residents.

11. The duties of the positions of Brandon Residential Living Specialist A and B involve working directly with the residents, doing such things as feeding them, dressing them, washing them, and assisting them in using the toilet. Promotion to Brandon Residential Living Specialist B is automatic if an employee has satisfactorily served for one year as a Brandon Residential Living Specialist A (Grievant's Exhibit 1).

12. During his employment at Brandon, Grievant successfully completed an orientation program and training in the administration of medication. He received two performance evaluation reports, both of which rated him as a fully satisfactory employee (Grievant's Exhibits 6, 7).

13. Other than his dismissal, the only other discipline imposed on Grievant during his employment at Brandon was a written reprimand, dated October 30, 1980, for failure to assist co-workers in restraining an abusive resident. Grievant was warned that a "repetition of this kind of conduct will not be tolerated...and will result in further disciplinary action which may include...dismissal". Grievant did not grieve that discipline (Grievant's Exhibit 8).

14. On October 25, 1980, Grievant injured his back while lifting residents from their wheelchairs at Brandon. After that, notwithstanding discomfort, Grievant continued to work until December 4, 1980, when he again experienced severe pain in his back. Thereafter, from December 7, 1980, to August 30, 1981, Grievant was on medical leave of absence from work because of the injury to his back (Grievant's Exhibit 5, pages 4, 5, 6 and 7; Grievant's Exhibit 9). As a result of his back injury, Grievant filed a claim for Workmen's Compensation.

15. Upon his return to work on August 31, 1981, Grievant was assigned to work in Dorm G, where he had initially been assigned in December of 1980, prior to his medical leave of absence. The Program Manager in Charge of Dorm G was Catherine Thomas. Most residents of Dorm E and G are classified as severely-to-profoundly retarded.

16. Thomas and Grievant did not have a good relationship. Grievant, on at least two occasions during the brief period he was assigned to Dorm G, applied for transfer to Ken DeAngelis' (another program manager) dorm. In addition, Grievant (with the help of his wife) on October 9, 1981, wrote to the Superintendent of Brandon Training School complaining of difficulty he had in getting paid for overtime, and of accusatory comments Thomas and his immediate supervisor (Sam Booska) had made about him to the effect he was "getting in the habit of taking three days off a week" (Grievant's Exhibit 10, pages 1 and 2).

17. Employees at Dorm G work three shifts: the A.M. shift (5:45 a.m. to 2:15 p.m.), the P.M. shift (1:45 p.m. to 10:15 p.m.) and the night shift (10:00 p.m. to 6:00 a.m.) Thomas normally worked from 7:45 a.m. to 4:30 p.m.

18. In 1981, the 280 Brandon residents incurred a total of 1972 injuries.

19. At Brandon, there was a written policy concerning abuse of residents by employees. That policy, #2030, contained the following pertinent provisions:

1. Purpose  
...Physical...abuse of residents will not be tolerated and substantiated evidence of such staff action will result in a serious disciplinary response.

## II. Definitions

- A. PHYSICAL ABUSE shall mean any act...which results or could result in physical harm to a resident. A charge of physical abuse may be substantiated without an observable injury. Spanking, hitting or rough treatment shall be considered physical abuse. Planned physical interaction for therapeutic purposes shall not be considered abuse.
- G. If the Superintendent finds by a preponderance of the evidence that an employee has ...physically...abused a resident, that employee shall be disciplined in accordance with the seriousness of the offense. Ordinarily, such resident abuse is a removal offense, but mitigating or extenuating circumstances may be considered.

(State's Exhibit 1)

20. Although Grievant did not sign a statement indicating he read and understood Policy #2030 until October 26, 1981 (after the alleged abuse incidents at issue here), he was fully aware it was wrong to physically abuse residents. He knew abuse of residents could lead to severe discipline, including dismissal.

21. Walter Ellis is a resident of Dorm G. He is a 34 year old man with a borderline level of mental retardation. He also suffers from cerebral palsy with athetosis. Confined to a wheelchair, and with leg braces, Ellis is unable to walk, although he is able to stand with assistance. He does not speak, but is able to communicate by means of a word board, which allows him to point out various words (in excess of 100), including the words "yes" and "no". He understands virtually everything said to him, and is able to accurately communicate events in his life. He is able to read magazines and type to some degree (State's Exhibit 30).



22. From 1978 through 1981, Ellis suffered 28 injuries. None of the injuries were serious, with the exception of a broken talus bone in his foot suffered on October 12, 1981.

23. Ellis is self-abusive. He tends to get frustrated easily and has tantrums, which consist of screaming, hitting his head with his knuckles, rocking back and forth with his whole body, and stamping his feet on the floor. Ellis has inflicted minor injuries on himself (i.e. bruises, superficial cuts, scratches). Ellis is unable to lift his legs up to the level of his seat and kick out. From the evidence before us, we are unable to conclude whether Ellis is physically able to break his own foot.

24. Ellis' bones are affected by a condition known as osteoporosis, which means his bones are brittle and weaker than other adults with normal physical health. This is because Ellis does not stand upright and put pressure on his bones like an adult without his disability.

25. At Brandon each resident has an "Habilitation Plan" prepared by staff members. The purpose of the "plan" is to encourage good behavior, and to discourage bad behavior (which is referred to in the institution as a resident's "off-task behavior"). In order to encourage good behavior, employees are instructed to praise residents (called "reinforcement" at the institution) when they are good. When residents are bad (or "off task"), employees are instructed not to punish the resident, but to, in essence, ignore the bad behavior. There are two main techniques employed in order to correctly ignore bad behavior. The first such technique is called "exclusion time out", which means that the misbehaving resident is made to sit quietly in a corner until he ceases to misbehave. The

other technique is called "extinction", which means that the resident is isolated somewhere until his misbehavior ceases. The staff at Brandon is responsible for knowing the habilitation plan of each resident they work with.

26. Ellis' habilitation plan is designed to increase appropriate use of his word board, increase positive behavior, and decrease self-injurious behaviors. The plan provides that when Ellis engages in self-injurious behavior, he will have a leather helmet put on him and be placed on extinction and denied his scheduled reinforcer (i.e. canteen trips, trips to the pool or playground, social praise, social interaction) until his "off-task" behavior stops (State's Exhibit 20).

27. Grievant was aware that if Ellis engaged in self-abusive or "off task" behavior, the proper procedure to follow was to put a leather helmet on him and place him in "extinction".

28. On October 9, 10, 11 and 12, 1981, Grievant worked the A.M. shift at Dorm G. Grievant did not work on October 13 or 14, 1981, as those were his normal days off. On October 11, 1981, four other employees, besides Grievant, worked the A.M. shift in Dorm G. The "charge" (or supervising employee) on that shift was Residential Living Specialist C, Sam Booska. Monday, October 12, 1981, was Columbus Day, a State holiday. Four other employees, besides Grievant, worked the A.M. shift that day, and Sam Booska was again the charge (State's Exhibit 15, pages 1, 2).

29. On the morning of October 12, 1981, Grievant's duties included assisting the residents on the first floor of Dorm G in getting dressed. Sometime around 7:00 a.m. Grievant woke Ellis, laid out his clothes for the day, and left to continue his duties with other residents. Grievant

returned to Ellis' room a few minutes later, and found Ellis had partially dressed himself (put on his shirt and pants). Grievant then helped Ellis put on his shoes/brace, which are attached and are actually one unit. Ellis was somewhat uncooperative in having his shoes put on, and was having a tantrum and pushing off. Grievant, who was angry at the time, was able to get the shoes/braces on.

30. After he was dressed, Ellis wheeled himself to the Dorm G dining room, which was on the same floor as his bedroom, at about 7:15 a.m. for breakfast. When Ellis got to the dining room, there were no other residents there, but Charge Sam Booska was there. Booska observed Ellis having a tantrum at his table (he knocked his breakfast off the table and onto himself and the floor). During the tantrum Booska saw no indication that Ellis was in pain. Booska, because of Ellis' tantrum, decided to put Ellis on "extinction, so he pushed him out of the diningroom into the Day Room at about 7:30 a.m. Ellis remained "on extinction" in the Day Room until about 8:00 a.m. During that time he was unsupervised and it is unknown whether any other residents passed through the Day Room.

31. Ellis' mother arrived at Brandon at about 8:00 a.m. on October 12, 1981, in order to take him to her home for a visit. She found Ellis all alone in the Day Room. Because his clothes were soiled, she took him to his room in order to change his clothes before the home visit. Mrs. Ellis removed the shoes/braces and soiled pants from Ellis. She encountered difficulty in removing Ellis' pants, and putting fresh pants on him because Ellis could not stand to assist her as was his usual custom. Finally, after she replaced his pants, Ellis objected to his

mother's efforts to put on his right shoe/brace. Mrs. Ellis was persistent but was not able to put the shoe on Ellis' foot. Ellis seemed to be in pain and obviously did not want the shoe put on. She summoned a staff member, who also tried without success, to get Ellis' right shoe on.

32. Ellis was then taken to a physician at Brandon, Dr. Dick, who examined his right leg. No swelling appeared, and, since it was Ellis' day for a home visit, Dr. Dick did not take x-rays and allowed Ellis' mother to take him home. Dr. Dick told Ellis to return to the infirmary the next morning to re-evaluate him.

33. Mrs. Ellis brought Ellis home without his right shoe on, and noted he would not bear any weight on his right foot. At one point, she accidentally hit his right foot and he reacted by straightening up in pain.

34. At some point, Mrs. Ellis asked Ellis if anyone had injured him, and Ellis indicated "no".

35. Mrs. Ellis took Ellis back to Brandon at about 2:00 p.m. on October 12, 1981.

36. On October 13, 1981, Ellis was seen again by Dr. Dick at Brandon. Ellis' right ankle was swollen and x-rays were taken. Ellis was, on that day, admitted to the infirmary for treatment (State's Exhibit 19, page 1; State's Exhibit 15, pages 3-5; State's Exhibit 37, page 1, State's Exhibit 38).

37. On October 16, 1981, Ellis was seen by Dr. Stanley Gryzb, a specialist in orthopedic surgery. Using the x-rays taken on October 13, 1981, Dr. Gryzb diagnosed Ellis' condition as a fracture of the neck of

the right talus. There was no objective medical evidence as to the cause of the fracture, and Dr. Gryzb saw no objective medical evidence as to the direction of the force which caused the fracture (Grievant's Exhibit 27).

38. On October 13 and 14, 1981, Ellis, through the use of his word board, told four of the Brandon staff (Donna Rutherford, Physical Therapist; Helen O'Dea, Occupational Therapy Assistant; Karen Hawley, Administrator Coordinator for Adult Development; and Catherine Thomas, Program Manager) that his foot had been injured by Grievant hitting him. Ellis specifically communicated to Rutherford, Thomas and Hawley that Grievant had hit him in the foot with the leg brace.

39. On December 18, 1981, Ellis, through his word board, told Thomas that Grievant was angry and picked up Ellis' shoes and braces and swung them at Ellis' foot, and that Grievant hurt Ellis' foot and it had not been hurt before that (Grievant's Exhibit 19).

40. Prior to the June 30, 1982, hearing on this matter, Grievant and his wife were eating breakfast at the Yankee Kitchen, a restaurant in Brandon. While they were there, Ellis came into the restaurant with his mother. At one point, Mrs. Ellis tapped Ellis on the shoulder and pointed at Grievant. Ellis turned his head and looked at Grievant.

41. At the June 30, 1982, hearing, Ellis, through use of his word board, testified Grievant hurt Ellis' right foot by hitting him with braces, that Grievant was angry at the time, that it was an accident, that Grievant did not tell him it was an accident, and that he did not think Grievant meant to hit him.

42. At the hearing, Grievant was present while Ellis testified. When asked to identify the person who hit him, Ellis said he could not see the person that hit him in the room. This is explained by the following reasons: 1) Ellis' view of Grievant was blocked by Grievant's counsel, who sat between Grievant and Ellis, and Ellis' head was tilted to the left and because of his disability he could not tilt his head to see Grievant on his right; and 2) Grievant had a full beard and moustache when he worked at Brandon and, at the hearing, was clean-shaven. This significantly changed his appearance.

43. Ellis is consistently truthful, even to the point of admitting he has not behaved well and thereby forfeiting his scheduled reinforcers.

44. The word "accident" has a special meaning at Brandon, meaning any bad event that happens. The term is not used to distinguish intentional behavior from non-intentional behavior.

45. From the credible evidence before us, we conclude Grievant broke Walter Ellis' right foot on October 12, 1981, by deliberately hitting him in the foot with Ellis' leg brace/shoe when he was attempting to get Ellis' shoes/braces on.

46. On the morning of October 12, 1981, at some point after breakfast, Grace Carusi was with Sam Booska in Booska's office in Dorm G. Carusi was usually assigned to Dorm E, but on October 12, 1981, she worked in Dorm G (State's Exhibits 14, 15 (page 2) and 16 (page 2)).

47. Resident Fred Meader, who is mentally retarded, came to Booska's office to ask for a cup of coffee, which was kept in a locked room known as the "Med" room. Meader had done some work in the dormitory. Grievant walked by and Booska asked Grievant to get Meader the coffee as a

reinforcer for the work he had done. Grievant and Meader left Booska's office together and turned to the left, towards the dining room where the cups were kept. Meader did not have a cup when he was in Booska's office, and it was necessary to obtain one from the dining room. Moments later, Meader appeared at the office, without a cup, complaining that Grievant had hit him on the head with a green cup. Meader bent down so Booska could feel his head. Booska did and found no bump or bleeding. Grievant was seen simultaneously in the hall with a green cup in his hand. There were no witnesses to confirm Meader's version of the incident.

48. Subsequent to this incident, Booska did not ask Grievant whether he had hit Meader with the cup and did not investigate the incident. He filed no accident report because he did not believe the incident was serious enough to warrant one and reported the incident only after he was aware Grievant was suspected of other instances of abuse of residents.

49. We have not been assured or convinced statements made by Meader are reliable, and we find that his statements are not consistently reliable.

50. The State has not established by a preponderance of the evidence that Grievant struck Meader over the head with a cup.

51. Besides the incidents involving Walter Ellis and Fred Meader, there were two other injuries sustained by residents on Dorm G during the 1981 Columbus Day weekend. On October 10, Brian Lake suffered a head gash requiring 10 stitches. Grievant was on duty at the time. On October 11 or 12, George Billings' leg was broken, and he suffered bruises (State's Exhibit 10). The evidence does not establish whether

Grievant was on duty at the time of the injury. Neither Billings nor Lake were able to communicate and there were no known witnesses to their injuries who could communicate.

52. On October 14, 1981, Thomas requested an investigation of Grievant's connection to the Ellis, Meader, Billings and Lake "accidents" (State's Exhibit 10).

53. At 5:45 a.m., on October 15, 1981, Thomas met Grievant at the door to Dorm G, and read him a statement to the effect that he was, effective that day, temporarily relieved from duty with pay pending an investigation into alleged resident abuse. Thomas did not specify the allegations against Grievant.

54. Also on October 15, 1981, the Assistant Superintendent for Habilitation Services, Peter Aines, sent Grievant a letter advising him he was "temporarily relieved from duty with pay, effective October 15, 1981, pending the results of the investigation of allegations of resident abuse" (Grievant's Exhibit 11).

55. There is no evidence before us that Grievant at any time grieved this temporary relief from duty.

56. Article 15, Section 8 of the Agreement provided, in pertinent part, as follows:

An appointing authority may relieve employees from duty temporarily with pay for a period of up to 30 workdays to permit the appointing authority to investigate or make inquiries into charges and allegations concerning the employee... Employees temporarily relieved from duty shall be notified within 24 hours with specific reasons given as to the nature of the investigation, charges and allegations.

57. On October 15, 1981, Superintendent Morrey appointed a panel of employees to investigate the four charges of abuse. On October 22,



1981, the panel submitted its report, wherein it concluded Grievant was exonerated of the charges against him (Grievant's Exhibit 26). Grievant was reinstated to duty status effective October 23, 1981 (Grievant's Exhibit 13).

58. On November 6, 1981, Grievant was again temporarily relieved from duty with pay upon the instructions of Commissioner Richard Surles to the Brandon Administration to continue the investigation into the recent resident injuries (Grievant's Exhibit 14).

59. On November 20, 1981, VSEA filed a Step II grievance, alleging Grievant's November 6, 1981, relief from duty violated the contract. Included among the allegations was that Grievant had not been notified of the specific nature of the allegations against him. Immediate reinstatement of Grievant to his position was requested (Grievant's Exhibit 15).. Commissioner Surles answered the Step II grievance on December 15, 1981, continuing the suspension with pay "pending the outcome of my investigation of the circumstances surrounding the injuries incurred by four residents in Dormitory G, October 10-12, 1981" (Grievant's Exhibit 18). There is no evidence before us that the grievance was filed at the Step III level with the Department of Personnel.

60. Subsequently, the Superintendent ordered a second investigation. That investigation was conducted by Assistant Attorney General E. M. Allen. The report of this investigation was issued January 4, 1982, and in it Allen concluded Grievant had abused Fred Meader and Walter Ellis (State's Exhibit 6).

61. During his investigation of Grievant, Allen became aware of Grievant's prior convictions and escape from North Carolina.

62. On January 8, 1982, Commissioner Surles signed a letter notifying Grievant of his dismissal. That letter provided, in pertinent part, as follows:

This is to inform you of your immediate dismissal from employment as a Brandon Residential Living Specialist A immediately upon receipt of this letter. The reasons for your dismissal are as follows:

1. Gross misconduct which jeopardized the health of a person under your care in two instances. Our investigation leads us to conclude that in one case you struck a mentally retarded resident under your care with a plastic cup; in the other you struck a developmentally disabled resident in the foot with a leg brace, which resulted in fracturing the talus bone of the resident's foot.
2. Falsification of a material fact on your employment application which concealed a conviction and sentence within the preceding five years.

Either incident of resident abuse, standing alone, or the falsification of a material fact on your employment application by itself is sufficient just cause for your dismissal.

Because you are being dismissed for gross misconduct in jeopardizing the health of a resident in your care, you will not receive two weeks notice or two weeks pay in lieu of notice.

(Grievant's Exhibit 22)

63. In making the decision to dismiss Grievant, Commissioner Surles was aware of the contractual requirements of progressive discipline. Surles did not review the contents of Grievant's personnel file (except for the employment application), but relied, almost exclusively, on Allen's report. Surles limited his review to the specific allegations of abuse and falsification of the employment application made against Grievant and did not review his past employment history.

64. When dismissing Grievant, Commissioner Surles was under the erroneous impression Grievant's employment application had been submitted on January 30, 1979, because Grievant had inadvertently misdated the application.

65. Grievant's dismissal was effective on January 11, 1982 (Grievant's Exhibit 5, page 12).

66. At all times relevant herein, Article 15 (entitled "Disciplinary Action") of the Agreement provided, in pertinent part, as follows:

1. The parties jointly recognize the deterrent value of disciplinary action. Accordingly, the State will:
  - a. act promptly to impose discipline within a reasonable time of the offense;
  - b. apply discipline with a view toward uniformity and consistency; and
  - c. impose a procedure of progressive discipline, in increasing order of severity:
    - i. oral reprimand
    - ii. written reprimand
    - iii. suspension without pay
    - iv. demotion
    - v. dismissal

The parties agree that there are appropriate cases that may warrant the State bypassing progressive discipline or applying discipline in differing degrees so long as it is imposing discipline for just cause.

2. The appointing authority or his authorized representative may dismiss an employee for just cause with two weeks' notice or two weeks' pay in lieu of notice...

3. Notwithstanding the provisions of Paragraph 2 above, an employee may be dismissed immediately without prior notice or pay in lieu of notice for any of the following reasons:

- a. gross neglect of duty;
- b. gross misconduct;
- ....
- d. conviction of a felony;
- e. conduct which places in jeopardy the life or health of a...person under the employee's care.

(Grievant's Exhibit 24)

67. Grievant has not been employed since his dismissal. For the period beginning on February 27, 1982, and ending on May 8, 1982, Grievant collected unemployment benefits of \$107.00 per week, for a total of \$1,177.00. For the period beginning on May 15, 1982, and ending on July 9, 1982 (the second day of hearing of this matter), Grievant collected unemployment benefits of \$101.00 per week. At the time of his dismissal, Grievant's gross hourly pay was \$4.51 (Grievant's Exhibit 25).

#### OPINION

##### Procedural Issue

In the grievance filed with the Board, Grievant alleged that his periods of temporary relief commencing with letters received on October 15, 1981, and November 6, 1981, were in violation of the Agreement because Grievant was not informed in writing of the specific nature of the allegations against him. From the evidence before us, we note that while the November 6, 1981, action was appealed at the Step II level of the grievance procedure, neither of the temporary reliefs from duty were appealed at the Step III level to the Department of Personnel, pursuant to Article 16 of the Agreement. We have no jurisdiction to hear this

portion of the grievance because it was not appealed pursuant to procedures contained in the Agreement. 3 VSA 926, 928(b)(1). Board Rules of Practice, Section 23.1. VSCFF and Michael Peck v. Vermont State Colleges, 139 Vt. 329 (1981). Moreover, in order to prevail on this point, Grievant must establish prejudice that resulted. By presenting no evidence on such prejudice and not briefing the matter, we conclude the claim waived.

#### Merits

Grievant was dismissed for abuse of two residents and for falsification of his employment application by concealing a conviction and prison sentence within the preceding five years. First, we will discuss whether the stated reasons are supported by the evidence, and then determine whether just cause existed for dismissal.

##### I. Standard of Proof

In dismissal cases involving State employees, the burden of proof is on the employer; and this Board must find operational facts by a preponderance of the evidence. In re Grievance of Ruth Muzzy, \_\_\_ Vt. \_\_\_ (July 15, 1982).

Muzzy notwithstanding, Grievant asks that the Board require that a greater standard of proof be borne by the State here, due to the most serious nature of the charges against Grievant; that resident abuse is essentially a criminal charge to which is attached a social and vocational stigma and the charge of lying on the employment application involves moral turpitude. Another factor which militates against acceptance of a mere preponderance of the evidence test, Grievant argues, is the nature of the witnesses against Grievant; the alleged victims of abuse who are

mentally retarded and the members of the Brandon staff who are protectors of the alleged victims. Grievant asks that the State be required to prove its case beyond a reasonable doubt.

We decline to adopt a higher standard of proof. Our function here is to determine whether there is just cause for discharge, not to assign criminal responsibility. Also, in cases of this kind, alleging abuse of mentally retarded and physically handicapped persons, the rights of helpless patients need protection as much as the rights of employees. Fairness to both requires a preponderance of the evidence standard, the same standard employed in all cases before us. Nevertheless, we recognize the unique nature of this case, the first one before us where a non-verbal, mentally-retarded person has testified and others have testified as to what he has communicated, and we have given this case intense scrutiny, weighing the competency and credibility of the witnesses before us. We also conclude, that if we were required to find that Grievant abused residents, particularly Ellis, beyond a reasonable doubt, the State has not met this burden.

## II. Abuse of Residents

### A. Walter Ellis

Grievant is accused of striking resident Walter Ellis in the foot with a leg brace, which resulted in fracturing the talus bone of Ellis' foot. We believe, based on a preponderance of the evidence, that Grievant is guilty of the charge.

In coming to this conclusion, we have accepted the testimony of Walter Ellis offered at the hearing that Grievant hit him with a leg brace in the foot. Experts have vouched for Ellis' intellectual capacity

to accurately communicate events in his life. This expert testimony convinces us as fact finders that it is reasonable to accept Ellis' testimony if we find it convincing. We have been assured uniformly by Brandon staff of the unswerving reliability of statements made by Ellis, and we find his version of how his leg was hurt consistent over time and credible. Grievant would have us not give great weight to Ellis' testimony because he was not sworn as a witness. It is true that when Ellis testified before us he was not under oath. However, no issue was raised as to Ellis' competence as a witness at the hearing by Grievant's counsel, and an oath was not insisted upon. These requirements were waived after express inquiry by the Chairman of the Board.

The timing and sequence of events on October 12, 1981, reinforce our belief Grievant injured Ellis. It is apparent Ellis' injury occurred sometime between 7:00-8:00 a.m. that morning because at 7:00 Ellis could put sufficient weight on his foot to put his pants on, but by 8:00, when his mother assisted him in changing his clothes, he could place no weight on the foot. That narrows the time of the injury to a one-hour period, during which time Grievant put Ellis' shoes/braces on.

There are two aspects of Ellis' testimony before us which require comment. First, when asked to identify the person who hit him, Walter could not locate that person in the room even though Grievant was there. This is most probably explained by the set-up of the hearing room and Ellis' disability. Grievant sat at a right angle to Ellis with Grievant's attorney between Ellis and Grievant, and Ellis was unable to turn his head to even look at the table at which Grievant was sitting. Ellis' inability to identify Grievant may also be explained by the fact that

when Grievant worked at Brandon he had a full beard and moustache, and at the hearing was clean shaven which significantly changed his appearance.

Second, Walter testified his injury was an "accident", and Grievant did not mean to hit him. If this injury was a true accident, we would hesitate to conclude this was a dismissable offense without more evidence of the degree of negligence involved. However, we do not believe it was a true accident. The word "accident" has a different meaning at Brandon than its commonly-understood connotation. It means any bad event that happens, and is not used to distinguish between intentional and non-intentional behavior.

In determining the intent of Grievant at the time he injured Ellis, we recognize that while the intent of Grievant at the time of the incident in question cannot be established with absolute certainty, we can look to objective standards to approximate such intent. Grievance of Goddard, 4 VLRB 107 (1981). We note that Grievant was angry when he dressed Ellis and find it unlikely Ellis' injury would have been as severe as it was if it was accidentally caused by Grievant. We find it particularly significant that Grievant denied having anything to do with an injury such as that described by Ellis and offered no possible explanation how the injury occurred. These circumstantial factors and Ellis' own testimony are persuasive. We conclude Grievant intended to hit Ellis with the leg brace on the foot.

B. Fred Meader

Grievant is accused of striking Fred Meader, a mentally-retarded resident, on the head with a plastic cup. We accept the version of this incident as related by employees Grace Carusi and Sam Booska, including



their testimony that Meader came into Booska's office and told them Grievant hit him over the head with a cup, but this does not establish the truth of Meader's statement. Unlike the case with Ellis, we have no assurances from professionals that Meader is reliable and competent in relating the truth, and there was no evidence of injury. The fact that other residents were injured that weekend in Dorm G may raise the inference that Grievant abused Meader. However, we refuse to draw that inference and look only to the specific facts. We conclude the State has not met its burden of proving by a preponderance of the evidence that Grievant struck Meader.

### III. Falsification of Employment Application

Grievant is accused of falsifying his employment application by concealing a conviction and sentence within the preceding five years.

Grievant argues that even assuming Grievant did falsify his application as charged, that would not be a dismissable offense. Grievant alleges pre-employment conduct cannot be grounds for dismissal. We disagree; falsification of an employment application can certainly be grounds for dismissal. Courts and the National Labor Relations Board have ruled management was justified in discharging employees for such falsification, in cases where anti-union animus was charged. NLRB v. Florida Steel Corp., 586 F2d 436 (5th Circuit, 1978). Firestone Tire and Rubber Co. v. NLRB, 539 F2d 1335 (4th Circuit, 1976). Ashland Oil Co. of California and Dean Buckley, 201 NLRB No. 78 (1973).

Regardless, Grievant contends Article 15 of the Agreement provides authority for dismissal of employees only for acts which occur during their employment; that it does not provide authority for dismissal based

upon acts which occur prior to the assumption of the status of a State employee.

Article 15 simply provides an employee may be dismissed for just cause. Under contracts providing just cause for dismissal, arbitrators have held employers have a right to discharge an employee for falsification of an employment application where the penalty is clearly stated and understood by the applicant, except where the misrepresentations are of a minor nature. Tiffany Metal Products Co., 56 LA 135 (1971). Powers Regulator Co., 56 LA 11 (1970).

We accept the prevailing philosophy that falsification of an employment application can constitute just cause for dismissal, since an employer has the right to expect employees to be honest in their dealings with and on behalf of the employer. Grievance of Barre, 5 VLRB 10 (1982). We note that Grievant here was on clear notice falsification of the application could lead to dismissal, such notice being given on the application itself.

However, in this instance we do not believe Grievant has falsified his employment application. In Genier v. Department of Employment Security, 140 Vt. 453 (1981), where the evidence indicated information concerning the nature of previous employment given by an unemployment compensation claimant during an employment interview was accurate and the employer did not inquire further as to her qualifications or check references, and the claimant was subsequently fired and denied unemployment benefits, the Supreme Court found the claimant did not misrepresent the nature of her previous employment since the claimant "was under no duty to disclose more than she was asked", and awarded her unemployment benefits. Similarly

here, Grievant was under no duty to disclose more than he was asked on the employment application.

He was asked:

In the past five years have you been imprisoned,  
on probation, or fined for any violation of any law  
or ordinance (except parking violations)?

Grievant answered "no", which was literally a truthful answer since he had last been imprisoned over five years previously. Even if Grievant intended to lie in answering this question, since he escaped from prison and should have been imprisoned in the past five years, is irrelevant because his answer is literally correct. We opt for the letter of the law, since the spirit of the law is too subjective. The King (or the State) has an obligation to frame precisely questions which may lead to punishment. As so powerfully dramatized in "A Man For All Seasons" (a play by Robert Bolt, pub. Random House, N.Y., 1960), the specific wording of a question (or oath in the case of Sir Thomas Moore) is vitally important. The State could easily have framed a question to cover Grievant's fact situation as a fugitive. It did not. We conclude Grievant answered the question truthfully, and did not falsify his employment application as charged.

#### IV. Just Cause for Dismissal

The remaining issue is whether there was just cause for dismissal of Grievant. One of the charges against Grievant has been sustained; one we find not supported by the evidence, and the other not supported in law. Did the State act properly in bypassing progressive discipline and dismissing Grievant?

The dismissal will be sustained if Grievant's conduct constituted "some substantial shortcoming detrimental to the employer's interests

which the law and sound public opinion recognize as a good cause for dismissal"; he had "fair notice, express or fairly implied, that such conduct would be grounds for discharge"; and the case is a proper one to bypass progressive discipline. In re Grievance of Ruth Muzzy, supra. In re Grievance of Yashko, 138 Vt. 364 (1980). In re Grievance of Carlson, 140 Vt. 555 (1982).

Grievant was on clear notice his actions could be grounds for discharge. Grievant deliberately struck resident Walter Ellis on the foot with a leg brace, thereby breaking the talus bone in his foot. Grievant was aware that such resident abuse would not be tolerated, and could lead to severe discipline, including discharge.

In determining whether his actions justified dismissal, we look to the relevant elements enunciated in Goddard, supra, for determining the appropriate penalty in a case like this where custodial employees engage in abuse of residents: contractual language on the appropriate penalty, provocation leading to incident, degree of force used and/or injury sustained by person attacked; intent to do harm; past incidents of unnecessary force by grievant; and overall record of the grievant.

In Goddard, a case involving a correctional guard who struck a resident, we reduced a dismissal to a suspension and demotion largely due to the grievant's good prior work record, no injury to the resident, and absence of intent on the grievant's part to physically harm the resident.

Here, an examination of the factors leads us to conclude there was just cause for Grievant's dismissal, and the case is appropriate for bypassing progressive discipline. We need look no further than the

deliberate action of Grievant who hit Ellis with the leg braces, and the resultant serious injury of a broken bone in the foot. These facts are sufficient to establish gross misconduct on Grievant's part, allowing the bypassing of progressive discipline. Grievant's position was one of custodial responsibility and trust; this imposed on him a special duty of care.

ORDER

Now, therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

The Grievance of Donald Bishop is DISMISSED.

Dated this 13<sup>th</sup> day of October, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney  
Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.  
William G. Kemsley, Sr.

James S. Gilson  
James S. Gilson

*Appealed to Sup Ct*